Filed 9/20/06 Marquez v. TCM CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT MARQUEZ, Plaintiff and Appellant, v. TCM CORPORATION, Defendant and Respondent.	E038189 (Super.Ct.No. SCVSS85552) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed.

Law Offices of Federico C. Sayre, Federico C. Sayre and James F. Rumm, for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, George A. Pisano and Robert Cooper, for Defendant and Respondent.

Plaintiff and appellant Robert Marquez (Marquez) appeals from the judgment in favor of defendant and respondent TCM Corporation (TCM), entered after the trial court

granted TCM's motion for summary judgment. Marquez contends the trial court erred in granting the motion based on the running of the statute of limitations because, under Code of Civil Procedure, section 351,[1] the statute of limitations was tolled while TCM was absent from the state.

STATEMENT OF FACTS AND PROCEDURE

Marquez was injured on December 4, 1996. A forklift truck driven by a coworker allegedly malfunctioned, struck Marquez, and pinned him against a stacking table, amputating one leg and severely injuring the other. Plaintiff timely sued TCM Manufacturing USA, Inc. (TCM USA), who he believed was involved in the design, assembly, manufacture, and sale of the forklift. TCM USA denied any involvement in the design, assembly, manufacture, or sale of the forklift. In December 2000, shortly after the deadline for serving Doe defendants in a civil case had expired, TCM USA disclosed that the actual manufacturer of the forklift was a Japanese corporation named TCM Corporation. In support of Marquez's opposition to TCM's motion for summary judgment in the current matter, an attorney for Marquez declared that subsequent "discovery later disclosed that TCM . . . was at least a ninety percent (90%) owner of TCM USA."

In September 2001, TCM USA prevailed on its motion for summary judgment on the ground that it had no role in the design, assembly, sale, or manufacture of the forklift. TCM USA also defeated Marquez's claim that it was the alter ego of respondent TCM.

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[1] All further statutory references will be to the Code of Civil Procedure unless

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On January 4, 2002, Marquez filed a complaint against TCM and others for negligence, product liability, and breach of warranty. TCM demurred based on the statute of limitations. Before the hearing on TCM's demurrer, Marquez filed a first amended complaint alleging that TCM was never "present within the State of California" and "never engaged in intrastate or interstate business in California, through any repeated or successive business transactions within the State." The purpose of this allegation was to invoke section 351, which tolls the statute of limitations while the defendant is outside the state. TCM again demurred, arguing that section 351 did not apply because TCM was at all times engaged in commerce and amenable to service under the California long-arm statute. The trial court overruled the demurrer.

TCM filed a writ petition challenging the trial court's demurrer ruling, which petition this court summarily denied. However, the California Supreme Court granted TCM's petition for review and ordered this court to issue an order to show cause. This court issued an unpublished opinion after briefing and oral argument. (*TCM Corporation v. Superior Court* (Dec. 17, 2003, E033303) [nonpub. opn.] (*TCM Corp*.).) In the opinion, this court ordered the trial court to sustain the demurrer because the allegations in the first amended complaint did not clearly establish that TCM did not have "minimum contacts" in California such that the tolling provisions in section 351 applied. However, this court also ordered the trial court to grant Marquez leave to amend the complaint if he could truthfully allege that TCM did not have minimum contacts. This court specifically

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otherwise indicated.

ruled that the physical absence from the state or the failure of a corporate defendant to register with the Secretary of State or designate an agent for service of process is not a proper basis upon which to invoke the tolling provisions of section 351.

Marquez filed a second amended complaint, which TCM answered. TCM then moved for summary judgment, which the trial court granted on the basis that section 351 did not apply because TCM did have minimum contacts with the state. This appeal followed.

DISCUSSION

1. *Standard of Review*

We review a ruling granting a motion for summary judgment using the de novo standard of review. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)

2. *Section 351- Minimum Contacts*

Marquez filed this action against TCM more than five years after he was injured in 1996. In 1996, the statute of limitations for personal injury actions was one year from the date of injury. (Former Code Civ. Proc., § 340, subd. (3).) However, section 351 provides that the statute of limitations for personal injury actions can be tolled while a defendant is absent from the state: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action."

As we stated in our unpublished opinion from the prior writ proceeding, "If a foreign corporation does business in California, it is amenable to service by serving the Secretary of State, and it is not considered absent from the state for the purposes of section 351. (*Loope v. Greyhound Lines, Inc.* (1952) 114 Cal.App.2d 611 (*Loope*).) Amenability to service of process is not dependent upon registration to do business under California law (*Raynolds v. Volkswagenwerk Aktiengesellschaft* (1969) 275 Cal.App.2d 997, 1001), but it does refer to the state's authority to exercise personal jurisdiction. Thus, a foreign corporation doing business in the state is amenable to the service of process, but one lacking minimum contacts is not doing business within the meaning of the statute permitting service on foreign corporations. (*Watts v. Crawford* (1995) 10 Cal.4th 743, 756.)" (*TCM Corp., supra*, E033303.)

Based on this reasoning, this court directed the trial court to allow Marquez to amend the complaint to see if he could truthfully allege that TCM did not have minimum contacts with the state. In this appeal, we now review de novo the trial court's determination that TCM was entitled to judgment as a matter of law because TCM maintained minimum contacts with the State of California.

A state's courts have personal jurisdiction over a nonresident defendant if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate '"'"traditional notions of fair play and substantial justice."' [Citations.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (*Vons*) (1996) 14 Cal.4th 434, 444-445, citing *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.)

Based on the nature of the contacts, personal jurisdiction may be either general or specific. "A nonresident defendant may be subject to the *general* jurisdiction of the forum if his or her contacts in the forum state are 'substantial . . . continuous and systematic.' [Citations.] In such a case, 'it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum.' [Citations.] Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. [Citation.]" (*Vons, supra,* 14 Cal.4th at pp. 445-446.)

General jurisdiction may not exist when an entity's activities in the forum state are not "substantial, continuous and systematic" enough to subject it to jurisdiction arising from all causes of action, regardless of whether the cause of action is connected to the defendant's business activities in the forum. In such cases, specific jurisdiction can still exist with regard to a particular cause of action when: 1) the defendant had purposefully availed itself of forum benefits with respect to the matter in controversy; 2) the controversy is related to or arises out of the defendant's contacts with the forum; and 3) the assertion of jurisdiction would comport with fair play and substantial justice, i.e., that it would be fair and reasonable. (*Vons, supra,* 14 Cal.4th at 446-447; *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 150-151.)

Here, the facts set forth in the declaration and later deposition of Yoji Wada, TCM's manager of development, make it clear that California has at the very least

specific jurisdiction over TCM.[2] This is because TCM has "purposely availed" itself of the benefits of doing business in California. TCM began doing so in 1976, when it appointed an exclusive distributor, C. Itoh Industrial Machinery, Inc. (CIM), for TCM products in the western region of the United States, including California.[3] TCM maintains relationships with CIM's network of dealers[4] in California that sell TCM products directly to California consumers, such as by reimbursing California dealers for warranty work performed on TCM products in California and by providing training to California dealers of TCM products to support the marketing and sale of TCM products in California. TCM has also designed forklift trucks especially for the California market that comply with California regulations on vehicle exhaust emissions. Finally, TCM has sent its own employees to visit California to conduct market research as a way to maintain and increase its sales in this state.

Marquez argues that TCM did not purposely avail itself of the California market because CIM, the exclusive distributor, was located in Houston, Texas. Marquez also contends that jurisdiction is defeated because it was CIM, not TCM, who then chose to sell TCM's products in California, in that nothing in the distribution contract requires the

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[2] As a matter of judicial economy, we do not decide whether California has general jurisdiction over TCM.

[3] TCM's contract with CIM requires both parties to cooperate to expand sales in the western United States.

[4] CIM maintains or has relationships with a network of dealers, in California and elsewhere, who sell TCM's products directly to customers.

distributor to sell TCM's products in California. However, we note that TCM's contractual relationship with the distributor has been ongoing since 1976, and the purpose of the contract was to sell TCM's products in the western United States, which includes California. In addition, California is widely known to be the home of several major ports and population centers that would presumably be major markets for TCM's forklift trucks and related products. As noted above, CIM has also maintained a network of dealers that sell TCM's products directly to California customers, and TCM manufactured some of its products specifically to meet California emissions standards. Given these facts set forth in the record, it is somewhat disingenuous to contend that TCM would be surprised[5] if its products ended up in California.

Under the second prong of the specific jurisdiction analysis, this lawsuit directly arises out of TCM's contacts with California. This is because Marquez alleges in the second amended complaint that TCM "designed, manufactured, assembled, marketed and distributed . . . [the forklift truck] . . . which is the subject of this action." The record also contains a document, entitled "TCM Delivery Report," which indicates that the forklift truck involved in Marquez's injury was sold by the distributor, CIM, to one of its dealers, Reno Forklift, Inc., located in Nevada, and ultimately to Marquez's employer, Pioneer Roofing Tile, in California.

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[5] Although foreseeability that a manufacturer's product would enter a forum state and cause injury is not by itself enough to establish jurisdiction, the facts set forth in Yoji Wada's declaration indicate that sales of TCM products in California have occurred over the past 30 years as a result of TCM's efforts "to serve, directly or indirectly, the market

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Under the third prong, the assertion of jurisdiction by California would also be fair and reasonable. Relevant factors include "[t]he convenience to the plaintiff, inconvenience to the defendant, and the interest of California in providing a local forum. . . ." (*Secrest Machine Corp. v. Superior Court* (1983) 33 Cal.3d 664, 672.) Here, while it is likely not convenient for TCM to defend against this action in California, it is manifestly easier, as an economic matter, for TCM to do so than for an individual plaintiff such as Marquez to prosecute this action in Japan. In addition, California has an interest in providing a local forum for this action because one of its residents was injured in California by a forklift truck shipped to and used in California by a California company.

Thus, TCM had minimum contacts with this state, and consequently the tolling provisions of section 351 do not apply.

3. *Law of the Case*

The bulk of Marquez's briefing in this matter is directed toward persuading this court that the "minimum contacts" standard for determining whether section 351 applies, as set forth in this court's written decision on Marquez's writ petition (*TCM Corp., supra,* E033303) is the incorrect standard. However, as respondent points out, "[W]here an appellate court states in its opinion a principle of law necessary to the decision, that principle becomes law of the case and must be adhered to in all subsequent proceedings,

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for its product" in California. (*Worldwide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297-298.)

including appeals." (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn*. (1998) 60 Cal.App.4th 1053, 1064.) This principle applies as well to an appeal from a final judgment where the appellate court has issued an alternative writ in the matter, the matter is fully briefed, there has been an opportunity for oral argument, and a written opinion has been issued. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) Thus, the "minimum contacts" test is the law of this case, and so we do not consider Marquez's arguments to the contrary.

Finally, the arguments of both sides as to whether the tolling of this lawsuit under section 351 would violate the commerce clause are moot.

DISPOSITION

The judgment of the trial court is affirmed. Each side will bear its own costs on appeal.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

GAUT
J.